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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 387

WILLIAM WALTER REMINGTON,
Petitioner,

against

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, William Walter Remington, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinion Below

The opinion of the Court of Appeals has not yet been reported, but is printed as Appendix B to this petition for the convenience of the Court (pp. iii-xiv).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on August 22, 1951. On September 20, 1951, Mr. Justice Jackson extended the time for filing a petition for writ of certiorari to and including October 20, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

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Questions Presented

1. Whether an indictment is invalid where the foreman of the indicting jury, at the very time the indictment was returned, was acting as the financial and literary collaborator of the chief prosecution witness in a book-publishing venture whose success depended upon the defendant's indictment.

2. Whether an indictment is valid when it so far fails to describe the offense charged that the court below was compelled to say that "the defendant did not know even at the end of the government's case what he had to meet.

3. Whether in a perjury case, it is essential that the government prove that the defendant had in fact testified falsely, or whether it is only necessary to prove that the defendant "believed" he had testified falsely.

4. Whether a conviction of perjury for denying membership in the Communist Party can be sustained when the government admits that it has no evidence whatever of an act of joining the Party.

5. Whether the "direct evidence" rule in a perjury case requires the government to produce direct evidence of the fact of defendant's membership in the Communist Party, or whether the rule requires only "direct evidence" of "overt acts" from which the jury might "infer" defendant's' "belief" that he was not telling the truth.

Statute Involved

18 U.S.C. §1621:

> "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 773."

Statement

Petitioner was indicted on June 8, 1950 for alleged violation of the perjury statute, 18 U.S.C. Section 1621. The indictment was in a single count, and alleged that the petitioner appeared before a grand jury in the Southern District of New York on May 25, 1950, and, being duly sworn, testified as follows:

"Q. At any time have you ever been a member of the Communist Party? A. I have never been."

It was further alleged that the question was material and that the "testimony of the defendant, as he then and there well knew and believed, was untrue in that the defendant had been a member of the Communist Party". There is no allegation in the indictment as to when or where the defendant is alleged to have been such a member, although in a bill of particulars the government alleges that the defendant was a member of the Communist Party at five separate and distinct and, as amended, consecutive periods between 1934, when the defendant was sixteen years of age, and 1944.

On June 13, 1950, petitioner pleaded not guilty. A trial before District Judge Gregory F. Noonan and a jury, began December 18, 1950. The case was submitted to the jury February 7, 1951, at 4:20 P.M., and a verdict of guilty was returned February 7, 1951, at 10:10 P.M. Judgment was entered February 8, 1951, and petitioner was sentenced to five years imprisonment and fined $2,000.

Petitioner filed notice of appeal from the judgment of the trial court February 8, 1951, and argued his appeal June 15, 1951 before Swan, C.J., A. N. Hand, and L. Hand, JJ. On August 22, 1951 the Court of Appeals for the Second Circuit reversed the judgment of the District Court and remanded the cause.

In reversing the judgment of conviction and remanding the cause to the District Court, the court held, *inter alia*, that the judge's charge to the jury had been fatally defective. However, the Court of Appeals made certain decisions and announced certain rules concerning the trial of a perjury case, as set forth in the following "Specification

of Errors to be Urged", which we believe should be reviewed by this Court at this time because of their great public importance and because some of them raise issues which are "fundamental to the further conduct of the case" (*United States* v. *General Motors Corp.*, 323 U. S. 373, 377 (1945)).

While a general review of the evidence contained in the record* is unnecessary for a decision of the issues raised by this petition, nevertheless, in view of the complexity of the case and the voluminous nature of the evidence, we believe that a bare outline of the basic facts underlying the case might aid the Court in following the argument.

This case had its origin in charges first made to the F.B.I. in the latter part of 1945 and later repeated before Congressional committees in 1948 by one Elizabeth T. Bentley, a confessed former Communist spy. She charged that the defendant was one of many persons employed by the government who had given her secret government information between the years 1941 and 1944, and that he had been a member of the Communist Party. When these statements were repeated in a radio broadcast, the defendant sued Bentley for libel. On February 19, 1950, he recovered $9,000 in settlement of this suit from the radio station and the sponsor (R. 1372-82). Shortly thereafter the present indictment was returned.

The defendant was born in New York City in 1917 and was brought up at his family home in Ridgewood, New Jersey. After graduating from high school in Ridgewood he entered Dartmouth College, Hanover, New Hampshire, in 1934, at the age of 17. In its bill of particulars the government alleges that he was a member of the Communist Party at five separate periods, covering ten years

* Because of financial inability to print the record, which includes a 4,045 page transcript of the trial, petitioner submits with this petition a motion to dispense with the printing of the record for purposes of considering this petition for certiorari. (See Appendix A.) All references to the record in this petition refer to the certified typewritten transcript which is filed herewith.

of the defendant's life, beginning with his entry at Dartmouth. For convenience, we shall follow these specifications in this outline:

(1) 1934-1936 at Hanover, New Hampshire. This covers Remington's freshman and sophomore years at Dartmouth College when he was 17 and 18 years old. Although the defendant conceded that he had been very radical during these years, no probative evidence in support of the allegation that he had been a member of the Communist Party during this period was introduced, and it was withdrawn from the jury at the close of the whole case with the consent of the government (R. 4026).

(2) 1936-1937 at Knoxville, Tennessee. During the academic year between his sophomore and junior years, Remington took a leave of absence to work as a messenger with the Tennessee Valley Authority at Knoxville, Tennessee. Although a considerable number of witnesses, nearly all former Communists, testified to various alleged communistic activities of the defendant during this period, the government in the court below conceded that the only direct evidence of membership at Knoxville was that the defendant had had access to a post office box which a former Communist organizer testified had been a Communist Party box. We shall argue hereafter that as a matter of law this was not "direct evidence" of membership.

(3) 1937-1939 at Hanover, New Hampshire. Remington left Knoxville in the end of June 1937, spent the summer with his family, and returned to Dartmouth as a junior in the fall of 1937, graduating in June of 1939 (R. 312). In the spring of his junior year he met Ann Moos, a student at Bennington College, Bennington, Vermont. They were secretly married in New York in November 1938 and later at a public religious wedding at the house of the bride's mother, Mrs. Elizabeth Moos, in Croton-on-Hudson. During the summer of 1939 they went to Mexico on a honeymoon trip. This was an unhappy marriage, ending in separation in 1947, accompanied by considerable

acrimony, and a divorce in 1949. Mrs. Remington testified at the trial for the government. Although she was extremely hostile, she admitted that her husband was not and could not have been a member of the Communist Party during his junior and senior years at Dartmouth (R. 304, 267). Since the trial, the government has conceded that it had no direct evidence of membership during this period. However, defendant's request to withdraw this period from the jury was denied by the trial court (R. 3811, 3733, 3747-8).

(4) 1939-1940 at New York City. During the academic year following his graduation from Dartmouth the newly-married Remingtons lived in New York while the defendant studied for a master's degree in economics, at Columbia. They visited Mrs. Moos' house in Croton quite frequently. Mrs. Moos was becoming quite radical, and at some time became a Communist (R. 447-8). She is now under indictment for failing to register as a Russian agent. At the Moos house, Remington met a number of Communists, particularly one Joe North, an editor of the New Masses. Mrs. Remington testified that during this period, though she says they were members of the Communist Party, they had no formal contacts with the Party (R. 442). "Membership" to her was a "state of mind" (R. 200, 202, 206, 283, 294). Since the trial, the government has admitted that it had no direct evidence of membership during this period. However, the defendant's request to withdraw this period from the jury was denied by the trial court (R. 3812, 3733, 47-8).

(5) 1940-1944, Washington, D. C. In the spring of 1940 the Remingtons moved to Washington, D. C., and Remington began working for the United States Government and continued working for the government in various capacities until after his indictment on June 8, 1950.

In the early winter or spring of 1942 the Remingtons met Miss Bentley in New York through a friend of Joe North. Thereafter, for two years Remington saw Bentley from time to time in Washington and gave her certain

information. He says he believed that she was a research worker for various writers and that he gave her only such information as would be proper under the circumstances. Bentley claims he knew she was a Communist and gave her secret information, although she admits he did not know she was a spy or that the material he gave her was going to Russia (R. 1163-8). Mrs. Remington indicates that he did know the material was going to Russia. A large portion of the record is taken up with conflicting testimony as to whether the information he gave her was secret. Both women testified that he paid "dues", although their testimony is very indefinite and far from direct. It is the only testimony in the record, other than the post office box, which the government contends constituted direct evidence of membership. We shall argue hereafter that as a matter of law it was not "direct".

In 1944 Remington stopped seeing Miss Bentley and enlisted in the Navy. Both Remington and Miss Bentley agree he stopped seeing her because he became suspicious of her (R. 2632, 1167, 1259-61). There is no claim that he was a Communist after 1944. Between that date and the time of the indictment, the uncontradicted evidence is that he repeatedly opposed Russian and Communist interests in his official acts and duties, as well as in private conversation (R. 3140-3, 3093-4, 2646-58), as indeed some of the evidence indicates he has done throughout his adult life.

The foregoing is intended to be only a very brief indication of the factual background of this case. The record, comprising 4,045 typewritten pages, contains a welter of evidence relating to various incidents indicating that the defendant associated with Communists, that he was either a "Red" or a "fellow traveler", that he had given Bentley secret government information, and, that when he was 18 or 19 years old he told people he was a Communist. But it is not necessary to discuss that evidence for the purposes of this petition. The only issues raised by this petition which require any understanding of the record relate to the history of Bentley's charges and her associ-

ation with the foreman of the indicting grand jury, and the two items of evidence above referred to which the government contends constitute direct evidence and which we contend, as a matter of law, do not.

Specification of Errors to be Urged

The Circuit Court of Appeals erred:

(1) In failing to dismiss the indictment on the ground that the foreman of the indicting grand jury, at the very time the indictment was returned, was the financial and literary collaborator of the chief prosecution witness in a book-publishing venture whose success depended upon the defendant's indictment.

(2) In failing to dismiss the indictment for failure to set forth the essential facts constituting the offense charged, particularly in view of the statement of the court below that "the defendant did not know even at the end of the government's case what he had to meet".

(3) In affirming the denial by the District Court of petitioner's motion for judgment of acquittal, in spite of the government's concession that it had no evidence of an act of joining and of the fact that the only two items of evidence on which the government relied to sustain the conviction fail as a matter of law to satisfy the rules applicable in perjury cases.

(4) In holding that in a perjury case it is not necessary for the government to prove that the defendant had in fact testified falsely, but only to prove that the defendant "believed" he had testified falsely.

(5) In holding that a defendant can be convicted for perjury for denying membership in the Communist Party when the government admits that it has no evidence whatever of an act of joining the Party.

(6) In holding that the "direct evidence" rule in perjury cases does not require direct evidence of the fact of defendant's membership in the Communist Party, and

in further holding that the rule only requires direct evidence of "overt acts" from which the jury might "infer" the defendant's "belief" that he had been a member of the Party.

Note: In the event that the writ is granted, petitioner would wish to reserve the right to argue, in presenting the case as a whole, an additional error of the Court of Appeals relating to the government's abuse of the grand jury process by calling fifteen witnesses, or potential witnesses, including several who had been subpoenaed by the defendant, before grand juries other than the indicting grand jury after the indictment had been returned, for the purpose either of intimidating them or obtaining an ex parte examination before trial.

REASONS FOR GRANTING THE WRIT

I

The decision of the Court of Appeals refusing to dismiss the indictment despite the fact that the foreman of the indicting grand jury was the financial and literary collaborator of the chief prosecution witness conflicts with the applicable decisions of this Court and constitutes an important question of federal law involving the integrity of the judicial process which should be settled by this Court.

The dangerous and startling situation presented by this petition can be summarized as follows:

(1) At the time of the indictment, the foreman of the indicting grand jury, one John Brunini, was collaborating with the chief prosecution witness, one Elizabeth T. Bentley, in the preparation and publication of a book in which she repeated her accusation that the defendant had been a member of the Communist Party and the success of which depended upon Remington's indictment.

(2) The prosecution's case was presented to the grand jury by Mr. Thomas E. Donegan, a Special Assistant to the Attorney General, who had previously been Bentley's personal attorney in a litigation arising out of her espionage activities.

(3) One of the first witnesses before the grand jury was Mr. Joseph A. Egan, Bentley's present personal counsel, who did not know Remington but had represented Bentley in the preparation of the defense of a libel suit based on her charge that Remington was a Communist, and whose testimony could only have been incompetent and prejudicial.

(4) Brunini and Donegan interrogated Remington, during a five-day grilling before the grand jury, on matters many of which were wholly unrelated to any crime, but directly related to the public dispute between Bentley and Remington as to whether he had ever been a member of the Communist Party, and finally asked him the crucial question, for the denial of which he was indicted.

(5) The United States Attorney deliberately withheld information concerning the collaboration of Bentley and Brunini from defendant's counsel and then sought to suppress the evidence when it became known to defendant's counsel from other sources.

The refusal by the court below to dismiss an indictment so procured threatens the maintenance of minimum standards of decency in the grand jury system and in the conduct of government prosecutions. The issue presented to this Court is nothing less than the integrity of the constitutionally-protected grand jury system. Because of the importance of that issue and the significance of the origin and background of this prosecution, as well as our inability to print the record because of lack of funds, we feel it our duty in this petition to present the facts in considerable detail. We ask the Court's forbearance with the length of our presentation of this point.

A. Bentley's activities as a spy.

In the latter part of 1945, one Elizabeth T. Bentley confessed to the F.B.I. that she had been a member of the Communist Party, a member of a Russian spy ring, and the willing tool and paramour of its head man. She charged that this defendant, among many others, was a member of the Communist Party and had given her information obtained from government files, which she trans-

mitted to Russia. *Her story,* repeated in public before an investigating committee of the United States Senate on July 30, 1948, and again in large part at the present trial, is briefly as follows:

She joined the Communist Party when she was a graduate student at Columbia University in March, 1935 (R. 1045). In 1938 she was put in contact with one Jacob Golos, and began doing research work for him, believing that she was helping him collect research material for writers on the Communist publication "New Masses" (R. 1048-49, 1139-41). After about a year or more, she discovered that Golos was really a Russian spy; but by that time she had become his mistress and she continued collecting information for him even though she now knew she was herself engaged in espionage (R. 1140-42). In 1941, she began working as a courier for Golos' spying activities, obtaining information from various government employees in Washington and bringing it to Golos for transmission to Russia (R. 1056-58). In the course of these operations she came in contact with various important government employees, and particularly with a group described by her as the "Silvermaster group", who were employed in various government departments, including the Treasury and even the White House itself (R. 1149-51). This group microfilmed all kinds of highly secret documents, which she collected for Golos every two weeks (R. 1152, 1155-59); through this group she learned such top secret information as advance plans for B-29 raids (R. 1157); the date of D-Day for the invasion of Normandy (R. 1158); and the fact that the government was about to break the Russian code (R. 1158).

In addition to the Silvermaster group, she had other sources, including a number of individual contacts who gave her information (R. 1161). Among these was Remington, who had been introduced to her by Golos, and whom she described as a "minor figure", one of the "least important" of her contacts (R. 1213) who did not know the material he gave her was going to Russia (R. 1166-7).

Golos died in November, 1943 (R. 1261). Bentley asserted that she went to the F.B.I. with her story in August,

1945, because her conscience was bothering her (R. 1169, 1289-92). But at the trial it developed that it was less her conscience that took her to the F.B.I. in August, 1945, than it was to inquire about a man whom she had recently met at the St. George Hotel in Brooklyn. This became evident when the defense introduced in evidence (Ex. T) a letter from the F.B.I. to Bentley, dated October 8, 1945 —almost two months after the August interview—which indicated that at that time the F.B.I. was interested solely in whether this man was impersonating an F.B.I. agent (R. 1336-9). On October 11, 1945, Louis Budenz, a Communist who had been associated with Bentley in some of her activities (R. 1296-1297), publicly announced that he had left the Party (R. 1343-4). We think it is apparent that it was not until after the Budenz revelations that Bentley began to tell the story of her own spying activities. But, be that as it may, she gave whatever information she had about herself and about Remington to the F.B.I. during the latter part of 1945 or early in 1946. No steps have ever been taken to bring Bentley to justice for her confessed crimes.

B. The beginning of the Remington investigation.

On April 15, 1947, about a year and a half after Bentley's "confession", three F.B.I. agents called on Remington and interviewed him for 3½ hours (R. 3248). Thereafter there were two other interviews.

In June 1947, Bentley told her story to a grand jury in New York (R. 1170). The defendant was also called before that grand jury and testified voluntarily and at length about his relations with Bentley and matters relating thereto (R. 2622-7, 2661-2). No indictment was returned against either Bentley or Remington or against any of the other persons publicly accused by Bentley (R. 1300-5).

C. Bentley supports herself by writing and lecturing about her unpunished criminal activities.

In the spring of 1948, Bentley called upon Mr. Frederick Woltman, a prominent writer on the New York World Telegram, to find out when the grand jury to which she had told her story was going to return indictments, for she thought the grand jury had taken "a long time" (R.

1305, 1316). Woltman put her in contact with Mr. Nelson Frank, also of the New York World Telegram, and she entered into a contract with Frank whereby he would be her literary assistant and would share with her the proceeds of any writings based upon her disclosures (R. 1306-9).

In July 1948, Frank wrote a series of sensational articles about Bentley for the World Telegram (R. 1309-12, Ex. S). Immediately thereafter, on July 30, 1948, she testified about her contacts with Remington before an investigating Committee of the Senate (R. 1312). A day or two after that she testified before the House Committee on Un-American Activities about many of her other espionage activities (R. 1313-5).

Since these public appearances in July, 1948, Bentley has supported herself most of the time by lecturing and writing about her experiences as a Communist spy (R. 1348-50). For the past year she has been engaged in writing a book on this same subject (R. 1350) in which she repeats her accusations against this defendant as well as others of her alleged spy ring (R. 1352). The book was serialized in McCall's magazine earlier this year and is presently available in all bookstores. She herself referred to the book as her "livelihood" (R. 1419-20). It is apparent, therefore, that the circumstances which will now be related must have been extremely damaging to her "career" as a writer and lecturer.

D. Doubt is cast on Bentley's story.

Despite Bentley's statements to the F.B.I. in 1945 and to the grand jury in 1947, Remington remained continuously in government employ, rising successively from one important position to another (R. 2641-61). Apparently Remington, with one possible exception (R. 1315), was the only person still in government service when Bentley, in 1948, made her public accusations against her 30 or so government contacts (R. 1313-5). On February 9, 1949, the defendant was publicly cleared by the Loyalty Review Board of loyalty charges based on Bentley's accusations and restored to his position at the Department of Commerce (R. 1355-9). His case received so much public notice that it

was natural for the issue of Bentley's credibility to focus on whether she was right about Remington.

In addition to Remington's clearance by the Loyalty Review Board, an even more serious threat to Bentley's career as a lecturer and writer arose. After her public appearance before the Senate Committee in 1948, Bentley repeated her accusations against Remington in public over a television network (R. 1352-4). He promptly sued her, as well as the television network and the program sponsor, for libel (R. 1354, 1369-72). After examination before trial of Bentley and considerable investigation of the facts by the attorneys for herself and her co-defendants (R. 1391), the television network and the sponsor settled the libel suit in February, 1950, by paying Remington $9,000 (R. 1372, 1382).

This then was Bentley's situation in the spring of 1950. Despite her public charges, Remington had been cleared by the Loyalty Review Board, and was holding an important position in the Department of Commerce. A libel suit based upon Bentley's charges against Remington had been settled by her co-defendants through the payment to Remington of a substantial sum of money. Not only this, but none of her many government contacts against whom she had made charges in her public appearances before the House and Senate Committees had been indicted at that time, or, for that matter, have ever been indicted (R. 1421-3).

These three circumstances combined to place her very means of livelihood in jeopardy. How could she continue lecturing or publish a book about experiences that had been successfully challenged by Remington, and about which the government had done nothing, unless something were done to prove Remington a liar?

In April and May of 1950, the House Committee on Un-American Activities reopened the Remington case. Bentley testified again (R. 1171) and in addition some witnesses testified to defendant's alleged membership in the Communist Party in Knoxville, Tennessee in 1936-7 between his sophomore and junior years in college (R. 595, 706). This of course had nothing to do with Miss Bentley's

charges of spying in Washington in 1942-3, five years later, but at most was evidence that defendant had, at some other time, been a Communist. Defendant was also examined by the House Committee in May (R. 2623), and was called before a grand jury in Washington around the same time (R. 2623). Again no indictment was returned.

This is the background upon which a grand jury in New York investigating espionage took up the Remington case later in May, 1950 (R. 2623).

E. The grand jury foreman's interest in Bentley and her book.

During the course of the trial, defendant's counsel received a call from a Mr. Brown who stated that a friend of his had information of importance to the defense (R. 1609). Brown had first offered his information to Judge Noonan, and was referred by the Judge to counsel (R. 1627-8). A week after the call, Brown brought his friend, a Mrs. Collins, to defense counsel (R. 1609). Collins had until shortly before the trial been in charge of publicity at Devin-Adair, the publishers of Bentley's book (R. 1598). Mrs. Collins was deeply troubled because she knew that during the time that Remington was appearing before the grand jury and at the time of the indictment, Mr. John Brunini, the foreman of the indicting grand jury, was collaborating with Bentley in the preparation of her book (R. 1598-1607).

This was the first information that the defense received about collaboration between the foreman of the grand jury and the chief prosecution witness (R. 1513, 1609) and this information became available to the defense just before Miss Bentley took the stand (R. 1607-09, 1627-29). Defense counsel pressed Bentley about her relations with Brunini. Bentley at first denied that Brunini did any writing on her book (R. 1377), but later conceded that he went over it "the same as any editor would" (R. 1377-79). Although Bentley admitted that Brunini had given her both "morale" and "editorial" support (R. 1377-78), she denied that he had any financial interest in her book (R. 1377, 1380). Bentley was evasive not only about her relations with Brunini, but even more

so about the book itself. She did not know when the book was to be published (R. 1381), although she talked about a "deadline" (R. 1419). She did not know where the book was since it was all in "bits and pieces" (R. 1417-9), although she several times referred to her "manuscript" (R. 1376, 1385). She would not even give the location of the book (R. 1417-21), although it was serialized shortly after the trial and has now been published in book form. She asserted that she never discussed with her publishers what the effect would be on her book if Remington was acquitted (R. 1381), although she conceded that she called Remington a Communist in the book (R. 1382).

During the course of Bentley's cross-examination, the defense produced and Bentley identified a contract between herself and Devin-Adair dated June 2, 1950 (6 days before the indictment). This contract, which was introduced in evidence by the defense (Ex. W, R. 1380), was witnessed by one Leyla Sefa (R. 1536). The defense called to the stand both Miss Sefa and Mrs. Collins. Neither Sefa nor Collins had ever met the defendant or had any interest in his acquittal (R. 1550, 1576, 1606). Indeed, the defense did not even see Sefa until the day before she appeared as a witness (R. 1563) and Collins until a few days before she appeared (R. 1609, 1627-9).

Mrs. Collins, who was publicity director for Devin-Adair until shortly before the trial (R. 1598), testified that she first saw Bentley when Bentley came to Devin-Adair with Brunini around the middle or end of May, 1950 (R. 1599). At that time the president of Devin-Adair, Mr. Devin Garrity, introduced Bentley and Brunini to Collins as follows: "This is Elizabeth Bentley who is going to do a book for us and this is John Brunini who is helping her do it • • •" (R. 1599).

Miss Sefa had been assistant to Garrity from October, 1949 to September, 1950 (R. 1535-6). Both Sefa and Collins identified the contract (Ex. W) dated June 2, 1950 between Bentley and Devin-Adair for the publication of Bentley's book (R. Sefa, 1536; Collins, 1601). Both witnesses testified that there was an earlier agreement prior to the one of June 2nd, under which Brunini was to be

Bentley's literary assistant and receive a part of the proceeds of the book (R. Sefa, 1537-1546, 1579-82; Collins, 1600, 1610, 1611). Sefa remembered typing a contract that embodied this agreement (R. 1545-6). Collins did not see the contract but, in response to a question by the United States Attorney, she testified that Garrity and Bentley stated that it had been signed (R. 1610-11).

Sefa, in response to a question by the United States Attorney, stated that Mr. Sloane, Editor of Devin-Adair, had told both her and Collins that the first contract was destroyed (R. 1594-5). Collins related that she had asked Bentley "Why was it necessary for us to destroy that contract, draw up another" and that Bentley replied "There is really no reason why we did it. We just thought it would be the best all around; there was no reason why we had to do it" (R. 1601-3). Sefa also testified that prior to the execution of the second contract dated June 2nd it was agreed that Brunini would receive compensation for his work on the book notwithstanding that this second contract did not mention him (R. 1546-50).

The testimony of the disinterested witnesses Collins and Sefa that Brunini and Bentley were collaborating on Bentley's book prior to the time of the indictment was not contradicted by any witness. The only part of the testimony of these two witnesses that was contradicted—and this only by Bentley—was the existence of the earlier contract under which Brunini had a financial interest in Bentley's book and the testimony that his financial interest survived the destruction of the earlier contract (R. 1380, 1386-8).

During the argument on the motion to dismiss the indictment, the United States Attorney announced that the "files of the government contain a full narrative of these incidents" (R. 1526-7). The United States Attorney further stated that he had discussed these matters with the Attorney General of the United States and with some Judges of the District Court, apparently with a view to quashing the indictment (R. 1527). Despite the fact that the matter was sufficiently serious to take up with the highest law officer of the United States Government, the

United States Attorney failed to make the information available to the defendant. The defense not only asked to inspect this narrative statement of the Brunini incident (R. 1637, 3132-4), but also, after the denial of its request, asked the trial court to seal the statement for the consideration of the appellate courts (R. 3126). In view of the unequivocal testimony of the two disinterested witnesses, Sefa and Collins, and the failure of the United States Attorney to call either Brunini or any of the officials of the publishing house, the refusal of the trial court to seal into the record the Brunini statement for the perusal of the appellate courts requires the acceptance of the testimony of Collins and Sefa on appeal.

In the light of the government's admitted knowledge of Brunini's connection with Bentley and her book, and its failure to give the defense any knowledge of this whatever, the conduct of the United States Attorney in cross-examining the two wholly disinterested witnesses who were called by the defense in an effort to establish these facts assumes a disturbing significance. The limitations of this petition prevent our discussing these incidents in detail. We can only ask the Court to read the typewritten record of that cross-examination, particularly the incident where Mrs. Collins was reduced to tears by the insistence upon a yes or no answer to what we can only describe as a trick question (R. 1615-37), and also to read the record of the proceedings on the next court day when the United States Attorney shouted to the jury that Collins and Sefa were "liars" (R. 1631).

In view of the fact that the true facts were known to the United States Attorney, this attempt to create the impression that the entire story was a fabrication was perfectly outrageous. If there was any part of the testimony of the witnesses Sefa or Collins that was not precisely in accordance with the "full narrative" in the possession of the government, it was the duty of the United States Attorney to state the true facts (*Griffin* v. *United States*, 183 F. 2d 990, 992-3 (App. D.C. 1950)) instead of adding to the impropriety of his original failure to inform the defense of all these facts before the trial by

this attempt to prevent the defense from proving any part of the facts at the trial.*

F. What happened in the grand jury room.

Before we discuss the legal effect of the aforementioned facts, we desire to point out certain other facts that strengthen the *prima facie* case already made for a dismissal of the indictment. Some of these facts are undisputed in the record. Others of necessity are only indicated by offers of proof. There may be still other facts unknown to the defense, for the defense is disadvantaged in presenting to this Court the story of what happened in the grand jury room owing to the fact that the defendant was denied an inspection of the minutes by the trial judge. The defendant, promptly after the Brunini incident came out in the record, moved to inspect all of the minutes of the grand jury on this ground, among others (R. 1527). Despite the overwhelming case that was made out for the inspection and despite the fact that the Government had rested, so that defendant could not be accused of seeking to discover the prosecution's case, the motion was denied (R. 1527-31). The defense then moved to inspect the minutes of defendant's testimony (R. 1531). This also was denied. Defendant's motion to have the minutes sealed and made a part of the record was reluctantly granted (R. 3126-32) and the minutes are thus available to this Court. (The Court of Appeals has now held that the defendant

* In view of the United States Attorney's failure to carry out his duty of informing defendant of these incidents, and indeed, on the contrary seeking to suppress these incidents, it was a little surprising to find the government raising, in the trial court and the court below, the question of the timeliness of the defendant's motions to dismiss the indictment. Having failed in its duty to disclose to the defendant facts which it had in its possession, the government cannot now take advantage of its own dereliction of duty to charge the defendant with failure to make its motions to dismiss at an earlier date. Whatever might have been the situation if the facts had been withheld from the defense by some subordinate official of the government, the withholding by the Attorney General of the United States and the United States Attorney is binding on the government. It was no doubt for this reason that neither the court below nor the trial court indicated that the motions came too late; apparently both courts were satisfied that there had been "cause shown" by defendant within Rule 12(b)(2).

should be permitted to see his own testimony in the event of another trial although for a different reason.)

The following additional facts are in the record:

The prosecution's case was presented to the grand jury by Mr. Thomas E. Donegan, a Special Assistant to the Attorney General (R. 1515-16, 1522-24). During the course of Bentley's cross-examination at the trial, she admitted, after first naming someone else, that Mr. Donegan had been her personal attorney in 1947 when he was engaged in the private practice of law (R. 1389-90) and had assisted her in recovering $7,200 from the cover job (R. 1388) that she had while she was a spy (R. 1280-5).

One of the first witnesses called before the grand jury was Mr. Joseph A. Egan, one of Miss Bentley's present personal counsel (R. 1391, 1496). Quite obviously, Egan could have had no personal knowledge of facts concerning Remington's alleged espionage or his alleged membership in the Communist Party; Egan was Bentley's personal counsel during the libel suit, after the association between Bentley and Remington had long since terminated; he had assisted in the preparation of her defense to that suit—*i.e.*, in seeking to prove that the defendant had been a member of the Communist Party (R. 1391). Consequently, Egan's testimony could only have been both incompetent and prejudicial. Defendant's motion to inspect the minutes of Egan's testimony (R. 1533) in an effort to prove these facts was denied (R. 3126).

Remington himself was subpoenaed before the grand jury, and kept there for five days (R. 2664). In support of defendant's motion to dismiss the indictment on the ground of the aforementioned facts (R. 1513), the defendant presented an affidavit setting forth alleged abusive and improper tactics by Messrs. Brunini and Donegan in the grand jury room (R. 1515). The affidavit set forth a number of subjects on which Brunini and Donegan had interrogated Remington which were wholly unrelated either to espionage or Communist Party membership, but were directly related to the public dispute between Bentley and Remington. Examples of such ir-

relevant subjects were what Remington's investigators during the libel suit uncovered about Bentley. Who was financing Remington's defense? Whether he knew certain reporters who had written favorable stories about the defendant and unfavorable stories about Bentley? Why hadn't he resigned from the Government? (R. 1515-16). What had these subjects to do with espionage—the only matter which the special grand jury was impanelled to investigate? Obviously, their only purpose was to aid in the campaign to rehabilitate Bentley.

Finally, when he was indicted, it was not for espionage, nor for any crime committed before he was called before the grand jury. During the course of his five days of cross-examination "in camera", he was asked the crucial question upon the answer to which the rehabilitation of Bentley's credibility, the consequent success of the book on which she and Brunini were collaborating, and the successful conclusion of the efforts of Bentley's lawyer, the witness Egan, in preparing the defense of the libel suit on her behalf, depended, and as to which, no doubt, her former private attorney and the present prosecutor, Donegan, was not unsympathetic: "At any time, have you ever been a member of the Communist Party?" He was indicted for perjury for swearing that he had not.

When the defendant took the stand in his own defense, his counsel sought to bring out the prejudicial action of the foreman during the questioning of the defendant before the grand jury. Having been denied the grand jury minutes, this was the only avenue of proof open to the defense. The United States Attorney vigorously objected and the judge sustained his protest (R. 2664). The United States Attorney's objection to the defendant testifying about the foreman's role at the grand jury being sustained, the defense made an offer of proof "to show the extent to which the foreman participated in the questioning and to show the abuse of the defendant before the grand jury by the foreman, all of which could not but have influenced the vote of the grand jury" (R. 2665).

G. The question before this Court.

This Court is thus faced with the question whether the transformation of a federal grand jury into a vehicle of private prosecution with the knowledge of the government warrants the dismissal of an indictment voted by that grand jury. A motion to dismiss the indictment on the ground of these gross improprieties was made at the close of the government's case (R. 1513), after Bentley had admitted that Brunini had collaborated with her in the preparation of her book (R. 1377-1378). It was repeated after the testimony of Collins and Sefa (R. 1624) and again at the close of the trial (R. 3723). The question was squarely presented to the court below and is squarely presented to this Court.

H. Under the decisions of this Court, the indictment must be dismissed because the gross improprieties in the grand jury room undermine the integrity of the judicial process and violate the constitutional guarantee of the Fifth Amendment.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *" Constitution, Amendment V. The purpose of this amendment was to insure that "no one shall be subjected to the burden and expense of a trial unless there has been a prior inquiry and adjudication by a responsible tribunal that there is probable cause to believe him guilty." *Beavers* v. *Henkel,* 194 U. S. 73, 84 (1903). Here the personal interest of Brunini, together with the relation of the prosecutor and of the witness Egan to Miss Bentley, prevented the indicting grand jury from performing its functions as an impartial or responsible tribunal.

One principle that stands out in the history of the grand jury as an institution is that it may not be used as the vehicle for partisan passion or private enmity. This Court, in *Ex Parte Bain,* 121 U. S. 1, 11 (1887), quoted Mr. Justice Field's historic charge to the grand jury that the grand jury:

> "is designed as a means, not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting a citizen against un-

> founded accusation whether it comes from government, or be prompted by partisan passion or private enmity."

The Federal courts have been vigilant in carrying out Mr. Justice Field's admonition and in preventing the grand jury from becoming a vehicle for the exploitation of private disputes. *United States* v. *Farrington,* 5 Fed. 343 (N.D. N.Y. 1881); *United States* v. *Kilpatrick,* 16 Fed. 765, 771 (W.D. N.C. 1883); *United States* v. *Wells,* 163 Fed. 313, 324-5 (D. Idaho 1908); *United States* v. *Rubin,* 218 Fed. 245, 248-9 (D. Conn. 1914).

It is important to remember that the grand jury is an arm of the court and that the transformation of the grand jury into a vehicle of private enmity is an assault upon the integrity of the judicial process. In *United States* v. *Coolidge,* 25 Fed. Cas. 622, 623, No. 14,858 (C.C.D. Mass. 1815), Mr. Justice Story states that:

> "The grand jury is the great inquest between the government and the citizen. It is of the highest importance, that this institution be preserved in its purity, and that no citizen be tried, until he has been regularly accused by the proper tribunal. Every indictment is subject to the control of the court * * *"

Here, indeed, we have the case of Mr. Justice Field's "private prosecutor" intruding into the grand jury room: a professed but unpunished criminal and her collaborator, the foreman of the grand jury, together with her past and present personal counsel, work in the jury room to bring about the indictment for perjury of the person who dared to call her a liar. What more flagrant example could be imagined of the improper intrusion of the private prosecutor into the deliberations of the grand jury?

The calling of Miss Bentley's personal counsel, Joseph A. Egan, before the grand jury, when he could have had no personal knowledge about defendant or his alleged Communist activities, would alone warrant the dismissal of the indictment upon the basis of the decided federal cases. *United States* v. *Rubin,* 218 Fed. 245 (D. Conn. 1914). Thus in *United States* v. *Farrington,* 5 Fed. 343 (N.D.N.Y. 1881), an attorney, who had previously insti-

tuted proceedings against two of the three defendants indicted, testified before the grand jury about facts of which he had no personal knowledge. The Court held that this was sufficient to justify a dismissal of the indictment. The Court said:

> "• • • It is patent that the grand jury permitted themselves to be influenced by the appeals and arguments of a zealous advocate, by hearsay testimony, and by testimony which the law prohibits, although they were advised to the contrary by the district attorney; and it seems much more probable that they were led to their conclusions by prejudice and undue zeal than by calm and fair deliberation. If there was evidence which authorized an indictment, it was so blended with and obscured by the mass of hearsay and otherwise incompetent testimony that it was impossible for the jury to distinguish it; and it would be expecting too much of a body, untrained in judicial investigation, to believe that they could discriminate intelligently between the competent and the incompetent evidence, so as to accord due weight to the former and be uninfluenced by the latter." Id. at 347.

We have been denied any opportunity to determine what Egan told the grand jury. But as his only connection with the defendant had been to try and prove he had been a Communist for the benefit of his client Bentley, we can only assume his testimony must have been improper.

Here the essential elements of lawful grand jury proceedings were violated. The foreman of the grand jury was not independent and disinterested. No one knowing the facts should have permitted Brunini to preside over the grand jury and to take the active part that he did in these proceedings. Indeed, the ancient oath of a grand juror "to present no one from envy, hatred or malice" (Charge to Grand Jury, 30 Fed. Cas. 992, 993) becomes a hollow mockery in the mouth of such a foreman. If in the selection of grand jurors one must not discriminate against race or religion or sex, which are mere indicia of bias, *Akins* v. *Texas,* 325 U. S. 398, 403 (1945); *Cassell* v. *Texas,* 339 U. S. 282, 283 (1950); *Ballard* v. *United States,* 329 U. S. 187 (1946), one must not permit a juror

inflamed by collaboration with the chief prosecution witness to preside as foreman.*

I. The reasoning of the court below conflicts with the decisions of this Court.

The constitutional protection against "the burden and expense of a trial" without prior "adjudication by a responsible" grand jury (*Beavers* v. *Henkel*, 194 U. S. 73, 84 (1903)), has always been zealously enforced by this Court. For example, this Court has repeatedly made clear that the action of a grand jury is void where there has been discrimination in its selection and without regard to any question of the influence or prejudice which this discrimination had upon the action of the grand jury (*Akins* v. *Texas*, 325 U. S. 398, 403 (1945); *Cassell* v. *Texas*, 339 U. S. 282, 283 (1950); *Ballard* v. *United States*, 329 U. S. 187, 195 (1946)). As this Court stated in the *Ballard* case, "reversible error does not depend on a showing of prejudice in an individual case. * * * The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." See also *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 225 (1946).

But the Court of Appeals, although it took cognizance of the facts related above, held that "the indictment should not be quashed unless undue influence is shown."** (Appendix B, xiii.) We respectfully submit that this holding is in

* It should be noted here that the present indictment was not for a crime committed elsewhere which was being investigated by the grand jury; it was for a crime committed in the grand jury room in answering a question presumably put to defendant by the prosecuting attorney or the foreman. In view of the interest that the foreman of the grand jury and the prosecuting attorney had in the chief prosecution witness, the case takes on strong elements of entrapment. *Sorrells* v. *United States*, 287 U. S. 435 (1932).

** In so holding, the court below seemed to rely on Rule 6(b) (2) which provides that "an indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment." But the court's

direct conflict with the rule laid down by this Court in the foregoing cases. Moreover, the Court of Appeals not only held the undue influence must be shown, but it held that, even though there might have been undue influence, the indictment should not be quashed unless the defendant is able, without the aid of the court or an inspection of the grand jury minutes, to prove undue influence. Thus the Court, after pointing out that the defendant might be able to show undue influence from the minutes of his own examination before the grand jury, an inspection of which had been allowed for other reasons, continued:

> "It is true that Brunini's alleged abuse of powers may have occurred while the defendant was not on the stand, and that without examination of the rest of the grand jury minutes the defendant may not find it possible to show undue influence. But we are unwilling to turn the indictment procedure into a separate trial. *Although it is possible that some abuses may thus go uncorrected,* it has been the policy of the law, and we think a sound one, to correct only such irregularities as the accused can prove, since an indictment is, after all, no more than an accusation." (Italics ours.) (Appendix B, xiii-iv)

Surely, if it is necessary to show "prejudice" in such a case as this, the defendant must at least be permitted to examine the grand jury minutes on such a showing as here presented. Otherwise, he would seem to be limited to calling members of the grand jury and asking them to publicly confess that their deliberations were improperly influenced.

The fallacious reasoning of the court below is further illustrated by the statement that an indictment is "no more than an accusation." What the court below overlooked is that it is an accusation, which, under the express provisions of the Constitution of the United States, must be made by a responsible tribunal. It is the likelihood of prejudice from the irresponsible nature of the grand

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reliance is misplaced. We are not here objecting on the ground that the foreman of the grand jury "was not legally qualified." We are objecting on the ground that he had a personal and private interest in procuring the indictment of this defendant for denying that he had ever been a member of the Communist Party.

jury rather than any actual prejudice which is determinative. *Tumey* v. *Ohio,* 273 U. S. 510, 522-23, 535 (1927); *Glasser* v. *U. S.,* 315 U. S. 60, 75-76 (1942).

J. This Court should grant review now.

It may be argued by the government, which has sought from the first to suppress this issue, that the question of the grand jury proceedings can be raised after another trial. But this is no ground for this Court withholding review at this time. This record squarely presents a question involving the integrity of the judicial process in the federal courts. This issue will never be more ripe for adjudication than it is today no matter how many retrials the government undertakes.

Remington has been under investigation by various agencies of the United States Government for six years. He has been called before three grand juries, two loyalty boards, two congressional committees, and one petit jury. Remington has already been "subjected to the burden and expense" of one trial lasting over six weeks and requiring an investigation of every phase and activity of ten years of his life on the basis of an indictment which should never have been returned. That trial exhausted his resources and those of his family so that at the present time he is heavily in debt and without funds to print the record in this Court or to defend against another prosecution undertaken with the unlimited resources of the government. Surely, he should not be subjected to a second trial on an invalid indictment. Surely, too, this Court should not delay in exercising its duty of "judicial supervision of the administration of criminal justice in the federal courts" (*McNabb* v. *United States,* 318 U. S. 332, 340 (1943)) and in vindicating the constitutionally-protected grand jury system which has been brought into disrepute by the events reflected in this record.

DARK PAGE BLEEDTHRU

II

The decision of the Court of Appeals sustaining the validity of the indictment conflicts with the applicable decisions of this Court and of other circuits, and presents an important question of federal law which should be settled by this Court.

The indictment alleges that the defendant committed perjury when he testified as follows:

> "Q. At any time, have you ever been a member of the Communist Party? A. I have never been."

The indictment further alleges that the question was material and that the "testimony of the defendant, as he then and there well knew and believed, was untrue in that the defendant had been a member of the Communist Party". There is no allegation as to when or where the defendant is alleged to have been a member of the Communist Party, or as to what facts are alleged to constitute the legal status of membership.

In an indictment for perjury at common law, it was necessary to set forth the truth of the alleged false statement. *Bartlett* v. *United States,* 106 Fed. 884 (9th Cir. 1901). Although in recent years the Court of Appeals for the Second Circuit has increasingly tended to uphold perjury indictments which did not contain such detailed specifications, the basic rationale of such cases in the past has been that such details are unnecessary, and therefore surplusage, where "the allegation of falsity is in effect an allegation which shows with certainty what the government claims the truth to have been". *United States* v. *Otto,* 54 F. 2d 277, 278 (2nd Cir. 1931).

We submit that it is apparent that in the present case "the allegation of falsity" is *not* "in effect an allegation which shows with certainty what the government claims the truth to have been". For the Court of Appeals itself in the course of its opinion pointed out that this defendant "never learned until the filing of the government's brief on appeal what acts the prosecution would contend showed that he believed himself to have been a member

of the Party"; and again, "As the case was tried, the defendant did not know even at the end of the government's case what he had to meet". (Appendix B, ix, x.)

At the opening of the trial the defendant moved to dismiss the indictment on the ground that it neither informed the defendant of what he had to meet, nor the Court of what the government had to prove. This motion was denied and the denial was upheld by the Court of Appeals, which said:

> "* * * perjury consists in testifying to the truth of a fact which the accused does not believe to be true; * * *. In the case at bar the indictment charged that Remington did not believe his denial of membership in the Communist Party, since it alleged that he 'well knew and believed' that his testimony was untrue." (Appendix B, v.)

We submit that an indictment is not valid simply because it alleges a crime in terms of the statute. The Sixth Amendment to the Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation * * *."

Rule 7(c) of the Federal Rules of Criminal Procedure implements the Sixth Amendment, providing:

> "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged * * *."

This Court said in *United States* v. *Cruikshank*, 92 U. S. 542 (1875), at pp. 558-9:

> "It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny. * * * Therefore, the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear—that is to say, appear from the indictment, without going further —that the acts charged will, if proved, support a conviction for the offense alleged."

We respectfully submit that an indictment under which the defendant does not learn until after the trial is over what he has to meet fails to comply with that test.

The Court below suggested that to avoid this unfairness at another trial "the prosecution should be compelled to declare in a bill of particulars those 'overt acts' which it will prove as required in perjury and from which it will argue that the accused believed he had been a member of the Communist Party" (Appendix B, x).

The Court thus suggests that an indictment which concededly does not inform the accused of the very acts which form the *corpus delicti* of his crime could be cured by a bill of particulars. Yet this Court has ruled that a bill of particulars is not to be considered in determining the validity of an indictment. *Dunlop* v. *United States,* 165 U. S. 486 (1897), and see *United States* v. *Comyns,* 248 U. S. 349 (1919). And it is the widely recognized rule that a bill of particulars cannot cure a bad indictment. *Collins* v. *United States,* 253 Fed. 609 (9th Cir. 1919). As the Circuit Court for the Eighth Circuit said in *Jarl* v. *United States,* 19 F. 2d 891, 894 (1927):

> "• • • we do not know on what reason, or by what authority a District Attorney can assume to specify [in a bill of particulars] the particular offense the grand jury intends to charge, nor do we believe any statement he might make in that respect would be binding as of record on a plea of former jeopardy. He has no power of control or right to change the action of that body. There are cases in which that practice is appropriate, but the indictment must be good on its face; and that procedure cannot be resorted to, with or without the request of defendant, to amend an indictment which is bad because of a lack of precision, certainty and accuracy in charging the offense."

We respectfully submit that it is thus apparent that the decision of the Court below is in conflict with the decisions of this Court and of other Circuits. We submit further that this is not a mere matter of form. Had the indictment specified the "overt acts" upon which the government relied as proof that the defendant had been a member of

the Communist Party, as we believe it should have done and as the Circuit Court of Appeals (with some modification discussed in the next Point) now directs should be furnished in a bill of particulars before another trial can be had, we suggest that it might have been impossible to obtain a valid indictment. If the recital of these "overt acts" had gone beyond the available evidence, it is quite probable that the grand jury would not have returned an indictment. On the other hand, as we shall see in the next Point, if the recital had been limited to the available evidence of overt acts as disclosed by this record, the indictment would have been demurrable for failure to state an offense.

We submit that this issue presents an important question of federal law which should be decided by this Court. We cannot believe that an indictment which concededly does not inform the defendant of what he had to meet can be valid.

III

The decision of the Court of Appeals sustaining the denial of defendant's motion for a judgment of acquittal and holding that it was not necessary for the government to prove that the defendant had in fact been a member of the Communist Party conflicts with applicable decisions of this Court and of the other circuits, presents an issue fundamental to the further prosecution of this case, and raises important questions of federal law which should be settled by this Court at this time both in the public interest and in the interests of justice.

In the Court below, both the government and the defendant assumed that in order to sustain a conviction for perjury it was necessary for the government to prove, by direct evidence duly corroborated, both that the alleged perjurious statement was false in fact and that the defendant knew it to have been false. This has been the universal rule applicable to perjury cases both in this

country and in England, so far as we are aware, and this Court in *American Communications Assn.* v. *Douds,* 339 U. S. 382, 410, 411 (1949), recently indicated how the rule should be applied in proving the falsity of a denial of membership in the Communist Party:

> "In proving that one swore falsely that he is not a Communist, the act of joining the Party is crucial."

Accordingly, the defendant contended in the courts below that his motion for a judgment of acquittal should have been sustained by the trial court and that such a judgment of acquittal should now be ordered, not only because there was no evidence of an "act of joining", but also because there was no direct evidence of any kind in the record and the government's own evidence affirmatively established that the defendant never had joined the Party.

In answer to these contentions, the government conceded in its brief below that it had no evidence that the defendant had joined the Party, but contended that certain evidence in the record relating to the alleged payment of Communist Party dues and the defendant's use of an alleged Party post office box was no less "direct" than an act of joining (Government's brief below, pp. 19-20).

We replied that this concession required a judgment of acquittal, because it was apparent that as a matter of law neither of these items constituted direct evidence of membership and that in any event, the evidence relied on by the government not only failed to establish either that the payments were "dues" or that the box had been a Party box when the defendant had access to it, but, on the contrary, affirmatively established that the defendant never had joined the Party.

But the Court below held that it was not necessary for the government to prove that the defendant had in fact been a member of the Communist Party, either by direct evidence or otherwise, and sustained the trial court's denial of defendant's motion for a judgment of acquittal without passing on the question of whether there was any direct evidence, and indeed, without any discussion of the

evidence whatever. We believe that this decision is in conflict with existing Federal law both in this Court and in other Circuits (a) as to the principle of law announced by the Court, and (b) in its application to this case.

A. The decision of the Court of Appeals that in a perjury case it is not necessary for the government to prove that the defendant had in fact testified falsely, but only to produce direct evidence of "overt acts" from which the jury might "infer" the defendant's "belief" that he had testified falsely, conflicts with applicable decisions of this Court and of the other circuits and raises an important question of Federal law which should be settled by this Court.

Although the Court of Appeals reaffirmed the rule that in order to sustain a conviction in a perjury case there must be "'direct' proof of the crime by two witnesses who testify that the accused violated his oath, or 'direct' proof by one witness plus corroborating circumstances" (Appendix B, viii), the Court held that the "crime" did not consist in swearing to a statement that was false in fact, but only in swearing to a statement which the defendant did not "believe" to be true. Thus in upholding the validity of the indictment, the Court held that "perjury consists in testifying to the truth of a fact which the accused does not believe to be true" and continued: "The further allegation [in the indictment] that he had in fact been a member of the Party was surplusage, but proof of the fact of membership might be relevant on the issue of his belief that he had been a member" (Appendix B, vi). In further amplifying this new doctrine the Court later defined it as follows:

> "Hence the doctrine that perjury must be proved by the direct testimony of two witnesses or one corroborated witness means that the witnesses must testify to some 'overt act' from which the jury may 'infer' the accused's actual belief". (Appendix B, viii).

The sole Federal authority cited by the Court in support of this proposition is the language of Title 18 U.S.C.A. §1621, which reads as follows:

> "Whoever, having taken an oath before a competent tribunal, * * * that he will testify, declare, depose, or certify truly, * * * wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, * * *"

Literally applied, this would seem to support the position taken by the Court, but, as this Court held in *United States* v. *Norris,* 300 U. S. 564, 574 (1937), that statute, which was first enacted in substantially its present form in 1873 as Revised Statutes §5392, subsequently became Criminal Code §125, and is now 18 U.S.C. 1621, was intended to give effect to the then existing common law.

We know of no case in any Federal Court either before or since the enactment of that statute which even suggests that it is not necessary to prove actual as well as wilful falsity under a perjury indictment. Indeed, the very cases cited by the Court below in support of the rule requiring direct evidence show that it is the falsity of the defendant's statement, rather than his "belief" in its falsity, that must be established in accordance with that rule.

For example, in *Clayton* v. *United States,* 284 Fed. 537 (4th Cir. 1922), the Court reversed a conviction for perjury in the prohibition era because there was no direct evidence that the defendant had *in fact* sold liquor, and in *Radomsky* v. *United States,* 180 F.2d 781 (9th Cir. 1950), the Court reversed because there was no direct evidence that the defendant had *in fact* not mailed a certain letter which she swore she had mailed. There is no suggestion in either case that the only issue is whether the defendant "believed" he had sold liquor or mailed the letter.

Even the cases cited by the Court below from its own prior decisions sustain this general principle:

In *United States* v. *Hiss,* 185 F.2d 822 (2nd Cir. 1950), cert. den. 340 U. S. 948, the questions at issue were whether the direct testimony of Chambers that Hiss had given him certain papers was sufficiently corroborated by proof that the papers had been written on Hiss' type-

writer, and whether Mrs. Chambers "independently" corroborated her husband's testimony as to meetings with Hiss. There is not a word either in the opinion or in the briefs regarding Hiss' "belief" as to the truth of these facts.

In *United States* v. *Otto,* 54 F.2d 277 (2nd Cir. 1931), the Court reversed a conviction because there was no direct evidence that the defendant had ever "talked to O'Connell about the Albany Baseball Pool." There was no suggestion that the only issue should be whether the defendant "believed" that he had never had such a conversation.

We do not mean to suggest that proof of "belief" in the sense of "wilfulness" was not also necessary in these cases. But we think it is apparent that in these, as indeed in nearly every perjury case, proof of actual falsity would also constitute proof of wilfulness. For example, proof that this defendant had in fact joined the Party would also constitute proof that he knew he had joined, unless the defendant were able to convince the jury he did not know that his proven acts constituted an "act of joining."

The same rule has been universally followed in this Court. In *Weiler* v. *United States,* 323 U. S. 606 (1945), where the issue was whether the defendant had bought or had in his possession on a certain date certain automobile tires, this Court, following its decision in *Hammer* v. *United States,* 271 U. S. 620 (1926), held that it was error for the trial court to refuse to charge the jury that "The Government must establish the *falsity of the statement* alleged to have been made by the defendant under oath, by the testimony of two independent witnesses or one witness and corroborating circumstances" (italics ours). There was no suggestion in that case that the jury could convict the defendant on the basis of "overt acts" from which they could "infer" that he "believed" that he had bought the tires or had them in his possession. And in the *Hammer* case, *supra,* this Court in holding that the rule regarding proof of perjury applied equally to prosecutions for subornation of perjury, said:

"Falsity is as essential in one as in the other. It is the *corpus delicti* in both."

To the same effect, see *United States* v. *Wood,* 14 Peters 430 (1840).

Nor do the miscellaneous non-federal cases and text-writers cited by the Court of Appeals in foot-note 4 of its opinion (Appendix B, v) sustain the proposition that it is not necessary in a perjury case to prove actual as well as wilful falsity. For example, in *Regina* v. *Schlesinger,* 2 Cox C. C. 200 (1847) the Queen's Bench sustained an indictment alleging that the defendant had falsely sworn that he thought that words were not his writing whereas in truth the said words were his writing and whereas in truth he thought that said words were his writing.

In *State* v. *Cruikshank,* 6 Blackf. (Ind.) 62 (1841) the Supreme Court of Indiana upheld an indictment alleging that the defendant had falsely testified that he believed the value of a certain cargo to be $9,000 "whereas in truth and in fact he did not" so believe, citing 3 Co. Inst. 166, as follows:

"* * * the plaintiff caused two men to swear the value of his goods that never saw them or knew them; and though that which they swore was true, yet because they knew it not, it was a false oath in them."

Similarly in *Commonwealth* v. *Miles,* 140 Ky. 577 (1910) and *State* v. *Gates,* 17 N. H. 373 (1845) convictions for perjury were sustained where it was proved that the defendant had testified that he knew a fact to be so, upon proof that he had no knowledge whatever concerning the fact sworn to.

We submit that these cases merely show that when a person asserts *as a fact* that he has certain knowledge or holds a certain belief, he may be convicted of perjury upon direct proof that, *in fact,* he did not hold such a belief or that he had no belief or knowledge. Certainly, they do not sustain the proposition that where a man is indicted for falsely stating a fact he can be convicted of perjury on the proof of "overt acts" from which a jury might "infer" that he did not believe his answer to be

true, without any proof that his statement was actually false.

We submit that a statute which for so many years and in so many cases has been consistently interpreted as requiring proof of actual as well as of wilful falsity cannot now be construed as requiring proof of "belief" alone. Nor do we believe, for reasons which will be apparent in a moment, that such an interpretation would be either wise or proper.

Having reached the conclusion that "the crime of perjury consists in the contradiction between the accused's oath and his belief", the Court below sought to apply it to the so-called "direct evidence rule." First, the Court pointed out that, in the absence of written or sworn contradictory statements, it was impossible to prove the defendant's "belief", *i.e.*, his "state of mind", by direct evidence. Accordingly, the Court concluded:

> "Hence it must be that the rule peculiar to perjury as to the character of the proof, means that it is the facts from which the jury may infer the accused's state of mind that must be proved by 'direct' evidence." (Appendix B, vii)

In support of this conclusion the Court cited that portion of the opinion of Chief Justice Vinson in *American Communications Association* v. *Douds*, 339 U. S. 382, 411 (1950), dealing with the method of proving "the state of a man's mind" in a prosecution for falsely denying a belief in the overthrow of the government by violence: After pointing out that "* * * while objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does" the Chief Justice concluded that "such manifestations" are "as much 'overt acts' as the act of joining the Communist Party".

We respectfully submit that the Court below has overlooked the portion of the Chief Justice's opinion immediately preceding the part from which the above quotations are taken, and which relate to the very question here in issue: proof of the falsity of a denial of membership in the Communist Party. When read as a whole, we sub-

mit that exactly the opposite conclusion from that drawn by the Circuit Court must be reached. The relevant portion of the opinion when read as a whole is as follows:

> "Insofar as a distinction between beliefs and political affiliations is based upon absence of any 'overt act' in the former case, it is relevant, if at all, in connection with problems of proof. *In proving that one swore falsely that he is not a Communist, the act of joining the Party is crucial.* Proof that one lied in swearing that he does not believe in overthrow of the Government by force, on the other hand, must consist in proof of his mental state. To that extent they differ.
>
> "To state the difference, however, is but to recognize that while objective facts may be proved directly, the state of a man's mind must be inferred from the things he says or does. Of course we agree that the courts cannot 'ascertain the thought that has had no outward manifestation.' * * * False swearing in signing the affidavit must, as in other cases where mental state is in issue, be proved by the outward manifestations of state of mind. In the absence of such manifestations, which are as much 'overt acts' as the act of joining the Communist Party, there can be no successful prosecution for false swearing." (Italics ours.)

Thus, this Court lays down in the clearest terms the distinction between proof of the falsity of a statement of "belief" and proof of the falsity of a statement of "fact"—and confirms our contention that the proper method of proving the "fact" of membership in the Communist Party is by proof of an act of joining.

It may be that under the authority of the cases discussed at page 36, *supra,* a defendant who swore that he did not believe in violent overthrow of the Government could be convicted of perjury upon direct proof, for example, that he had repeatedly advocated revolution. For that would be direct evidence of the *fact* that he held such a belief—unless the defendant could convince the jury that he hadn't meant what he had said. But that is a very different thing from saying that when a witness is asked to testify as to a fact or event, he could be convicted of perjury upon proof of an "overt act" from which the jury might "infer" that he did not "believe" his answer to be

true. For in effect, that is to say that every perjury case is not only a "state of mind" case, but a "circumstantial evidence" case. An "overt act" from which a jury may "infer" that a defendant didn't believe what he said, we submit, is no more than "circumstantial evidence" that he "believed" that he had lied.

Moreover, we submit that a moment's consideration of the practical application of this rule in the trial of a perjury case will show that it cannot and should not be the law. Thus the court below, after again repeating its conclusion that the so-called "direct evidence rule" in perjury cases "means that the witnesses must testify to some 'overt act' from which the jury may 'infer' the accused's actual belief," continued:

> "We do not see how the perjury rule can in practice be applied at all in such a case as the present unless the judge shall single out such 'overt acts' as furnish a rational basis for inferring what the accused thought constituted membership and which were supported as the rule requires, and shall then instruct the jury that unless they believe the testimony as to such facts—or at least one of them—and think that because of it, taken with any corroborating evidence, the accused must have believed he was a member, they cannot find him guilty." (Appendix B, viii)

We agree, of course, that it is necessary for the trial judge in a perjury case to single out the direct and corroborative evidence of guilt which must be believed by the jury in order to convict. But surely there is not much left of the perjury rule if all it means is that a person may be convicted on direct proof of circumstances from which the jury may infer his guilty intent.

Moreover, how is the trial court to determine what "overt acts" in the evidence "furnish a rational basis for inferring what the accused thought"? If we abandon all relation to the truth of the alleged false statement, *i.e.* the criteria for determining actual membership, what objective standards are to guide the trial court in determining what "overt acts" furnish such a rational basis, or an appellate court in reviewing such a determination? Could

the court charge the jury that they could "infer" from the testimony of two witnesses that the defendant had attended Communist Party meetings in Knoxville, that he "must have believed that he was a member", even though the witnesses admitted that they did not know of their own knowledge whether or not he had been a member? Or could a jury be permitted to "infer" from evidence, properly supported under the rule, that a defendant had opposed aid to Britain until the invasion of Russia, or had opposed military aid to Chiang Kai-Shek, (this defendant did neither) that he therefore "must have believed he was a member" of the Communist Party? Indeed, depending on the climate of public opinion, could not either of two witnesses who contradict each other under oath as to whether a certain State Department document does or does not prove that a certain individual had "considered" recognition of Communist China be convicted of perjury under this rule on proof of overt acts from which an inference could be drawn that he did not believe what he had said? And indeed, in such a case and under this rule we assume that it would be immaterial what the document in question said, or even that it might be equally susceptible of either interpretation.

We submit that as soon as we abandon the test of objective truth, we enter upon a realm of surmise and speculation which not only destroys all protection which the perjury rule is intended to afford to a defendant, but presents almost insurmountable difficulties in its application to the average perjury case.

As Mr. Justice Jackson pointed out in *Communications Association* v. *Douds,* 339 U. S. 382, at page 437:

> "• • • I know of no situation in which a citizen may incur civil or criminal liability or disability because a court infers an evil mental state where no act at all has occurred. • • •
>
> "It is true that in England of olden times men were tried for treason for mental indiscretions such as imagining the death of the king. But our Constitution was intended to end such prosecutions."

It seems to us that under the rule laid down by the Court below a man could be convicted of perjury upon proof of overt acts from which a jury might infer that he imagined that he had lied, even though he had not lied at all. We respectfully submit that this is not, and should not be, the law, and that the proper rule of perjury is that a man must be proved, by direct evidence corroborated, to have sworn not only wilfully, but falsely.

We respectfully submit that there is here presented a question of the utmost importance which should be decided by this Court at this time not only in the interests of justice to this defendant, but in the public interest. In the first place, there is a direct conflict between the decision of the Court below and those of this Court and other Circuit Courts. Secondly, it presents an issue "fundamental to the further conduct of the case." *United States* v. *General Motors Corp.* 323 U. S. 373, 377 (1945). If the Court of Appeals' rule is applied, we do not see how the case could be properly retried, or how the Court could properly charge the jury on a new trial. On the other hand, as we shall see in a moment, if the correct rule is applied to the undisputed evidence in this case, an order of acquittal must be entered, thus terminating this prosecution. Thirdly, it is a rule which we believe must be clarified in the interest of the general administration of justice. We need not point out the great importance at this particular time of establishing a correct, fair and workable rule for the prosecution for perjury in such cases as the present. Under the rule enunciated by the Court below it would seem very dangerous for anyone who for whatever motive has at any time favored, or even "considered", a policy which was also favored by the Communist Party or which some persons may think was helpful to the Communists, to deny under oath that he himself was a member of the Communist Party. Who knows whether under this rule and in this atmosphere evidence of such "overt acts" may not be relied on as a basis for inferring that he believed he had been a Communist? And who knows whether, at sometime in the reasonably foreseeable future, present support of Marshal Tito, or Franco, or of

our recent enemies, Germany and Japan, might not subject honest and patriotic citizens to indictments for perjury for a denial that they had been either Communists or Fascists, or whatever term may then be applied to those holding such views, on the ground that, in the light of the circumstances at that time existing, it can be made to appear that they could not have "believed" such support to have been truly in the interests of this country?

B. The decision of the Court below sustaining the trial court's denial of defendant's motion for a judgment of acquittal despite the government's concession that it had no evidence that the defendant had ever joined the Party, and the fact that as a matter of law the only evidence which the government even contended was "direct" evidence of membership was at most only circumstantial, conflicts with the decisions of this Court and of other circuits, and presents an important question of Federal law which in the public interest should be settled by this Court.

As we have indicated above, this case was presented to the Court below by both the government and the defendant on the assumption that it was necessary for the government to show that there was direct evidence in the record that the defendant had at some time in fact been a member of the Communist Party. We believe we have conclusively demonstrated in the previous Point that that is the correct rule. Moreover, as we have also pointed out, the government conceded in the Court below that it had no evidence whatever of an act of joining. We submit that it follows inevitably from an application of the correct rule to this case that the decision of the Court of Appeals sustaining the trial court's denial of defendant's motion for a judgment of acquittal was inconsistent with the decision of this Court in *American Communications Association* v. *Douds,* 339 U. S. 382, 410-11, and with the decisions of other Circuits requiring proof of falsity by direct evidence, and erroneous.

It seems to us, not only on the authority of the *Douds* case, *supra,* but as a matter of principle, that it must be the law that in order to prove membership in the Com-

munist Party in a perjury case there must be direct evidence of an act of joining. Such evidence is indubitably the best and most "direct" evidence of membership. On the one hand, unless the defendant had joined the Party he could not have been a member, however many witnesses may testify that, in their opinion, he acted like one. This is particularly well illustrated in the present case, where, as we shall see in a moment, the very witnesses upon whom the government relies in support of what it contends is direct evidence also establish that the defendant never had joined the Party. Under such circumstances we submit that no other evidence could either be "direct", or even of sufficient probative value to sustain a conviction.

On the other hand, proof of an act of joining is clearly the most unequivocal, and, we believe, the only truly "direct" evidence of membership. For example, direct evidence, duly corroborated, of such objective facts as that the defendant had applied for membership and been accepted, that he had paid his initiation fee, or that he had had a Party card, the issuance of which concludes the act of joining, would constitute direct evidence that he had been a member, just as evidence that the defendant in *Clayton* v. *United States,* 284 Fed. 537 (4th Cir. 1922), *supra,* had received money from X and handed him a bottle of whiskey, would be direct evidence that he had sold liquor. If such evidence is believed by the jury, there can be no possible doubt of the defendant's guilt, unless he proves that he didn't understand the nature of his acts.

Perhaps the best proof of the soundness of this view is to consider the argument which the government made below in an effort to show that there was other evidence in the record which was no less direct proof of membership than evidence of an act of joining. The government contended that proof of an act of joining would be "no more direct than" two items of evidence in the record, one relating to the alleged payment of Communist Party dues to Bentley in 1942 and 1943, and the other relating to his use of an alleged Party post office box in 1937. (Gov't Brief below, pp. 19-20)

We think it must be immediately apparent that as a matter of law neither of these items is more than circumstantial evidence of membership. "Circumstantial evidence is that which establishes the fact to be proved only through inference based on human experience that a certain circumstance is usually present when another certain circumstance or set of circumstances is present. Direct evidence establishes the fact to be proved without the necessity for such inference." (*Radomsky* v. *United States*, 180 F. 2d 781, 783 (9th Cir., 1950).) Obviously, it requires an inference from the fact that a person paid dues to the Communist Party or had access to a Communist Party post office box to the fact that he was a member, i.e. "He performed an obligation or exercised a privilege of membership: Therefore, he was a member." It might still be possible that he paid dues without having joined. Indeed, one government witness so testified (R. 279-83). On the other hand, it requires no inference from proof that he joined the Party to the fact that he was a member, for the act of joining itself creates the status of membership. It would not be possible to "join" without becoming a member.

Moreover, we submit that it is apparent from a consideration of the character of the evidence relied on by the government in support of this contention that under no circumstances could it be considered "direct". For it does not even establish either that the payments in question were "Communist Party dues" or that, at the time the defendant had access to the post office box in question, it was a Party box—although it does establish that the defendant never joined the Party.

On the question of dues, it is clear from the record in the case, and we think it is a matter of common knowledge to anyone who has made any study of Communist Party organization, as this Court has been required to do on several occasions, that dues are payable either every two weeks or at least once a month (Constitution Art. III, Sec. 2; By Laws: "Rate of Dues". Def's Ex. G), that payments are evidenced by the issuance of formalized

dues stamps bearing the Party insignia (R. 919, Def's Ex. B), which must be pasted in the member's card or dues book (R. 608, 919, 1178), and that the "book" itself must be turned in to Party headquarters every six months for the purpose of checking whether it contained the requisite number of dues stamps (R. 879, 881).

Even if it could be argued that direct evidence that a person paid dues regularly over a substantial period of time in accordance with these rules might constitute direct evidence of membership, on some such theory as that the purpose of the formalized stamps was to paste them in a "book" and that one could not have continued to be a member unless his book had been turned in and checked every six months, the evidence on which the government here relies not only shows that no payments whatever were made in compliance with these regulations, but that the defendant never did "join" and never had a "book."

The only evidence regarding dues relates to the period during which the defendant concededly had occasional meetings with Bentley, 1942 to 1944. Bentley says that during this period she received what she described as "Communist Party dues" from the defendant or his wife six or seven times in a period of more than two years (R. 1248-9), that she never gave the defendant or his wife any "dues stamps", although she did give them blank forms of receipts (R. 1240-1), and that she never saw the defendant's Party card or "book", but assumed that he had turned it in to Party headquarters (R. 3010). The only other government witness on this aspect of the case, the defendant's divorced former wife, testified that it was she, and not the defendant, who wanted to pay "dues" to Bentley (R. 389-90, 396); that she considered that the payments were Communist Party dues, although she is uncertain as to the amount or number of payments (R. 243, 396, 397, 404-6); that the receipts they got were not stamps but just a piece of white paper which she thought was "foolish" and "burned it up * * *. It did not seem necessary to get a receipt" (R. 397-9); that she and the defendant, although she claims they were both members

of the Party, never had any Party books or cards (R. 439-40), never filed an application for membership (R. 437), "were not orthodox Communists in the sense of following all the rules", "were Communists as much as we wanted to be Communists, and not subject to a hierarchy" (R. 441-2), did not join any unit because they "did not like the type person that was in these local units, petty bureaucrats, I would say" (R. 351), and finally, that for the three years preceding their introduction to Bentley they belonged to no branch (R. 351), attended no unit meetings (R. 437), and paid no dues, except "possibly something to Joe North, sort of unofficially" in that entire period (R. 309)—although she insists that if they did make such a payment to Joe North it "would have been dues" (R. 381). (Bentley thought they were already members at the time she met them (R. 3010)).

The characterization of these payments as "Communist Party dues" by Bentley and Mrs. Remington is, of course, no more than a conclusion, and does not make them so. The evidence is clear that many non-members paid money to the Communist Party (R. 1179a). Mrs. Remington herself admits she paid money which she called "dues" when she was not a member (R. 279-83). While it might be that proof *aliunde* that the Remingtons were members would prove that these payments were "dues", proof of the payments themselves certainly does not prove that they were members. We submit that it is perfectly apparent from the facts testified to by these government witnesses that the defendant never did pay "Communist Party dues", and moreover, that the defendant never joined the Communist Party and at most, even if these witnesses be given the fullest credence, was never anything more than a sympathizer or "fellow traveler". We submit that this is not "direct evidence of membership".

The evidence regarding the post-office box relates to the period prior to his marriage, when the defendant was working for the T.V.A. in Knoxville, Tennessee. This evidence is even less direct than the evidence regarding dues. Indeed, there is not even any competent evidence

that it was a Party box while the defendant was in Knoxville. The evidence is that the defendant had access to a certain post-office box in the Spring of 1937 (R. 2448) which the government witness Crouch, swore was the official Communist Party box for Knoxville, to which only Party members could have access. But at the time Remington was in Tennessee, Crouch was the Communist Party organizer stationed in South Carolina (R. 811). He did not become organizer for Tennessee until 1939, two years after the defendant had left Knoxville. However, Crouch says he knew it was a Communist Party box in 1937 because at some time during the spring or early summer of that year he sent Communist Party literature to it (R. 850). Obviously this is all the rankest hearsay, and not even competent circumstantial evidence that Remington was a member, much less "direct" evidence. In any event, Remington left Knoxville in the end of June, 1937 (R. 1887, 2194).

Moreover, the Party organizer, who was also secretary, for Knox County during the summer of 1937, one McConnell (R. 582-3), testified at length and in great detail for the government but was not asked about the box, although it is clear from Crouch's testimony that he would have had charge of it, if it had been the official Party box at that time. (The defense did not ask him about the box as Crouch had not yet testified). He also testified that although the defendant did a number of things which indicated that he was a member, nevertheless, although as organizer and secretary he had charge of the Party records (R. 677) he had never seen the defendant's book, collected dues from him, issued stamps or other necessary Party documents to him, or known him to be a member of the T.V.A. unit, to which, as a T.V.A. employee, he would have belonged if he had been a member (R. 676-7). When asked whether under these circumstances he could say that he knew of his own knowledge that Remington was a member, he replied "save by saying that my relations with Mr. Remington were those of fellow-Communists" (R. 684).

We submit that if the proper rule applicable to perjury cases is applied, it is apparent from the government's own evidence not only that the government failed to prove that the defendant was ever a member of the Communist Party, but that the defendant in fact never was a member. Indeed, we submit that, quite apart from any special rules applicable to perjury cases, and on simple principles of the "weight of the evidence", the government has failed to prove its case. Surely a man could not be proved to have been a member of a golf club by any amount of evidence that he used the club and paid greens fees, or that several former members thought he had been a member, in the face of testimony by the secretary of the club that, although he acted like a member, there was no evidence that he had joined, paid membership dues, or held a membership card, and by his wife, that although she considered them both members, they had not "joined" because they didn't like the other members. If he had been a member, these two witnesses were in the best position to have given direct testimony to that effect. Their failure to do so is the best proof that he was not.

We respectfully submit that in the light of this record the decision of the Court below sustaining the trial Court's denial of defendant's motion for a judgment of acquittal was in conflict with the decisions of this Court and of other Circuits referred to in the previous point, and was clearly erroneous. Moreover, we respectfully submit that this is a case in which this Court should now direct the entry of a judgment of acquittal.

We recognize that a new trial may be permitted in the Federal courts even though a judgment of acquittal should have been directed by the trial Court. But this, we believe, is generally permitted only when there was a failure in some aspect of the government's required proof which might, and from the record probably could, be readily cured on another trial. In this case we do not contend simply that the government has failed to prove its case. We think that the government's own witnesses have established the defendant's innocence. We do not see how the

government could prove in another trial that the defendant had at some time joined the Communist Party unless they were able somewhere to find another ex-Communist who would be willing to contradict the testimony given by their own witnesses on the first trial. Under such circumstances we can see no justification in permitting another trial. For the reasons set forth in Point I, *supra,* this defendant should not again be placed in jeopardy.

CONCLUSION

For the foregoing reasons, this petition for a writ of of certiorari should be granted

Respectfully submitted,

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